Reportable

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl.M.(M)No.3324 of 2003.

DATE OF DECISION : 20.08.2007

IN THE MATTER OF :

Madhavsinh Solanki ..... Petitioner.

Thru. Mr.Hamid Kureshi with
Ms.Seema Gulati,Advocates

- Versus -

State through CBI ..... Respondent.

Thru. R.M.Tiwari with
Mr.U.S.Prasad,Advocates.

CORAM :-

THE HON'BLE MR.JUSTICE A.K.SIKRI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

1. These proceedings are the side effects of long drawn infamous legal battle in Bofors case. Proceedings have been initiated against the

petitioner, who at relevant time was the Minister of External Affairs, Government of India, under Section 340 of the Code of Criminal Procedure for the offence under Section 193 of the IPC in the said main proceedings (Bofors Case entitled State Vs. Martin Ardbo, Former President of M/s.A.B. Bofors, Sweden & Others registered as Case No.RC.1(A)/90-ACB-1V/SPE-CBI/ New Delhi). It is not necessary to state in detail the facts of the main case or the history of the legal battle. Suffice it to note that CBI registered the case on 22.1.1990 against some named and unnamed persons including politicians and government officials alleging that they are involved in receiving Bofors bribe/kickbacks in the deal with M/s.AB Bofors Sweden (hereinafter referred to as the `Bofors') on 7.2.1990. The learned Special Judge issued a Letters Rogatory to the judicial authorities in the Confederation of Switzerland in connection with the said case. Through the said Letters Rogatory authorities were requested to collect certain documents from Swiss Ban k along with details of bank holders as well as certain other information.

2. The petitioner who, as aforesaid, was the Minister of External Affairs, Government of India at that time visited Davos, Switzerland in January-

February,1992. This visit was for attending the Annual World Economic Conference. It is alleged against the petitioner that during the period of that Conference, on 1.2.1992 the petitioner sought an appointment with the Swiss Foreign Minister Mr.Rene Felber or a few minutes in the Hotel and is said to have requested that there should be no witnesses. It is also alleged that in this meeting the petitioner gave an envelope containing an unsigned typed memorandum relating to the matter of execution of the aforesaid Letters Rogatory to Mr.Felber. It is also alleged that in his meeting with Felber, the petitioner said that he had new information about the Bofors case and that it was important for Mr.Felber to communicate that to the Swiss Government. Mr.Felber is said to have told the petitioner that he was not responsible for justice matters but he could take the document and pass it on to the Federal Office of Justice.

3. This act on the part of the petitioner is perceived as interference in the course of Justice and an attempt on the part of the petitioner to influence the investigation and also an attempt to fabricate the evidence and, therefore, constituting the commission of offence under Section 192 of the IPC. According to the prosecution, the memorandum was a

fabricated document and contained certain false statement of facts, which intended the Swiss Judicial Authorities dealing with the execution of Letters Rogatory to cause them to form an erroneous opinion touching a point, material to the result of the proceedings in the Bofors case, namely the legality and propriety of the Letters Rogatory and in this way the petitioner had committed an offence under Section 193 of the IPC.

4. As per the prosecution, in the course of execution of Letters Rogatory, statement of Mr.Rene Felber and others were recorded. Swiss authorities sent those statements as well as original memorandum in execution of the Letters Rogatory. Thus this memorandum allegedly handed over by the petitioner to Mr.Rene Felber had been collected by the CBI during investigation. On receipt thereof, the CBI filed the application under Section 340 of the Code of Criminal Procedure against the petitioner praying the learned Special Judge to record a finding that the petitioner herein had committed an offence under Section 193 IPC and to make a complaint to the competent Magistrate having jurisdiction.

5. The learned Special Judge deemed it proper to hear the petitioner before passing any order on this application and, therefore, vide order dated 9.6.2003 notice is issued to the petitioner on the aforesaid application of

the prosecution filed under Section 340 of the Cr.P.C.

6. Challenging this order, present petition is filed by the petitioner under Section 482 of the Code of Criminal Procedure as the petitioner wants that the said order be set-aside and the application filed against him under Section 340 of the Code of Criminal Procedure be dismissed.

7. As a demurrer, the respondent challenged the maintainability of the petition itself at this stage contending that only a notice is issued on the application moved by the CBI to take action against the petitioner under Section 340 Cr.P.C. though even that was not required in law as observed by the Special Judge himself. Therefore, such a petition against the order issuing notice was not maintainable. Submission of the learned counsel for the petitioner on the other hand was that the petition under Section 340 Cr.P.C. on the face of it was not maintainable as no prima facie case for offence under Section 193 IPC was made out even on the basis of averments made in the application and, therefore, it was the right of the petitioner to approach this Court at this stage itself, inasmuch as there was clear lack of application of mind on the part of the Special Judge in issuing the notice.

8. To buttress the aforesaid submission, learned counsel for the petitioner

argued that original note (memorandum) was not produced by the CBI, in absence whereof the petition itself was not tenable. It was argued that not even authenticated copy of the said document in accordance with the provision of the Indian Evidence Act was produced. It was submitted that in the absence of primary or secondary evidence of the ground and only document-memorandum note on which the entire CBI case was based, the CBI could not press the said application under Section 340 Cr.P.C. for proceeding criminally against the petitioner. The learned counsel relied upon the judgment of a learned Single Judge of this Court in the case of **Srichand P. Hinduja Vs. State through CBI** 2005 [2] JCC 1153 wherein in the main Bofors Case arising out of same FIR proceedings against Hinduja were quashed by this Court for want of original documents. It was next contended that perusal of the application filed by the CBI would show that none of the ingredients of Section 192 of the IPC were satisfied. In this behalf it was submitted that (1) the petitioner admittedly was not the maker of the note (2) note does not contain any false statement (3) note is not `evidence' under Section `3' of the Indian Evidence Act. Therefore, no prima facie case was made out for proceeding against the petitioner under Section 193 IPC and the

Section 195 Cr.P.C. was not attracted.

9. It was also contended that the note produced and relied upon by the CBI is not a document containing any false statement inasmuch as:

(i) There is no false statement made in the said note.

(ii) It is wrong to state that the note was a fabricated document and contained certain false statements.

(a) The statement in the note "though an enquiry took place in India, such allegations could not be proven" is a true statement. (Refer (i) JPC conclusions, and (ii) Janta Dal Vs. H.S. Chowdhary and others (1992) 4 SCC 305, the judgment which the Hon. Supreme Court gave is a case in which CBI was a party.)

(b) JPC enquiry (Enquiry by the Joint Parliamentary Committee on Bofors Contract) did take place in India, and the allegations made could not be proven, is a fact.

(c) The statement in the note "the enquiry opened in India led to several proceedings in India, where the validity and the legality of the request for mutual assistance had been challenged in the Indian Court" is not a false statement. It is a true statement.

(d) It is a fact that Joint Committee to enquire Bofors contract

was appointed by the Parliament. The said JPC report was presented to the 8th Loksabha on 26-4-1988 and was tabled in Rajyasabha on the same day.

(e) Thereafter several proceedings started in India, including a Public Interest Litigation, Criminal Misc. case No.12 of 1990 filed in the Delhi High Court by Advocate Shri Harinder Singh Chaudhari in which the validity and the legality of the request for Rogatory was challenged.

(f) The statement in the note "the matter is still not resolved in India, and some party Mr. Chadda filed a petition before the Delhi High Court, which will have to decide whether the Indian request for mutual assistance is valid or not under Indian law" is an absolutely true statement and not a misstatement. (Ref. Union of India and another Vs. W.N. Chadha AIR 1993 SC 1082).

(g) The statement "until final decision is issued by Indian Courts on that issue no further steps should be taken in Switzerland in this matter." is an expression of opinion on legal aspects. It cannot be called a misstatement.

(h) The statement "therefore the matter is still subjudice, and any action or judgment in Switzerland will have a very adverse effect" is an expression of opinion. It is not a misstatement.

(i) The statement that “no allegation could be proven although an enquiry had taken place in India” cannot be called patently false. It is a true statement. JPC enquiry did take place in India wherein no allegations could be proven.

10. It was also argued that said memorandum/note was given on 1.2.1992 and after a lapse of over 10 years i.e. 4.2.2003 the CBI filed the application before the Special Judge under Section 340 Cr.P.C. and this delay was itself fatal in initiating the proceedings. It was also argued that statutory mandatory provisions of law had also not been fulfilled as there was no lawful sanction obtained under Section 197 Cr.P.C. for proceeding against the petitioner. The petitioner who was Minister at the relevant time was a `public servant' and the sanction under Section 197 Cr.P.C. was, therefore, necessary. It was also submitted that there was no sanction obtained by the CBI under proviso to Section 188 Cr.P.C. prior to the inquiry and, therefore, entire proceedings, were void abnitio.

11. On this premise the learned counsel submitted that filing of such an application is misuse and an abuse of the process of the law and not even notice was required to be issued and this Court should exercise its power

under Section 482 of the Cr.P.C. to quash the notice and dismiss such an application in view of the judgment of the Supreme Court in the case of Madhavrao Jiwaji Rao Scindia and another Vs. Sambhajirao Chandrojirao Angre and others etc. AIR 1988 SC 709, N. Natarajan Vs. P.K.Subba Rao AIR 2003 SC 541 and in the case of M/s.Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque & others AIR 2005 SC 9.

12. Learned counsel for the CBI on the other hand submitted that in the course of execution of Letters Rogatory, statements of Mr.Rene Felber were recorded which were sent by the Justice Authorities along with other documents as well as original memorandum in execution of the Letters Rogatory. Further, as per the statement of Mr.Rene Felber the said memorandum was handed over by the petitioner to him and since it had been collected by the CBI during investigation, CBI could produce the same. It was also submitted that the said memorandum was handed over to Mr.Pirre Simonin who in his statement has said that he made a note for one of his staff at the left top on the memorandum that this document should be passed on to International Law Directorate. Therefore, the document has been duly identified during investigation.

On this basis the respondent claimed that ingredients of offence under Section 193 were made out as the act of the petitioner amounted to `causing any circumstance to exist'. In the judicial proceedings on the basis of which erroneous opinion could be entertained in the concerned judicial proceedings touching any point material to the result of such proceedings and, therefore, it amounted to `fabricate false statement' as per Section 192 of the Act. It was further submitted that for this purpose it was not necessary that the memorandum was signed by the petitioner. Handing over of such document would squarely fall within the purview of Section 193 of the Act and in support of this plea reliance was placed on Supreme Court judgment in the case of Ajay Agarwal Vs. Union of India (1993) 3 SCC 609.

13. Learned counsel for the CBI further submitted that sanction had already been obtained for prosecution under Section 197 Cr.P.C. as well as under Section 188 Cr.P.C. It was argued that under Section 188 Cr.P.C. sanction was necessary for trial which was duly obtained. Proviso to Section 188 regarding prior sanction was not attracted in the instant case. In this behalf it was argued that from the Scheme of Chapter XIII Cr.P.C., it is clear that neither the place of business nor the place of

residence of the accused and for that matter, even of the complainant, is of any relevance. The relevant factor is the place of Commission of the offence. By legal fiction, section 188 Cr.P.C. Which deals with offence committed outside India, makes the place at which the offender may be found, to be a place of commission of offence. The expression "at which he may be found" as used in section 188 Cr.P.C., has to be interpreted by holding that the "finding" of the accused under Section 188 has to be made by the Court and not by the Police or the Complainant. (**OM HEMRAJANI VS. STAE OF U.P. (2005) 1 SCC 617).** It was argued that obviously, the main case (Bofors case) was under trial before the Ld. Special Judge (CBI) at Delhi and the Court had issued the Letters Rogatory under section 166-A Cr.P.C. to the competent Court / authority in the Confederation of Switzerland for collection of documents from Swiss Bank Corporation, Geneva, Switzerland, Nordfinanz Bank Zurich, Switzerland and other with full details of account holders as well as the persons who were authorised signatories or beneficiaries for receipt of illegal remittance by M/s. AB Bofors. It was during the pendency of the execution of the said Letters Rogatory that the petitioner committed the offence punishable under section 193

IPC. Therefore, the act was committed when the judicial proceedings were in continuity and hence the proviso to section 188 Cr.P.C. is not attracted.

14. Learned counsel reiterated the preliminary submission regarding maintainability of the petition by contending that at this stage where only notice was issued, even when it was not mandatory, petition challenging order of issuing of notice could not be entertained. His submission was that Section 340 Cr.P.C., confers an inherent power in the Court concerned to make a complaint in respect of an offence committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, if that court is of opinion that it is expedient in the interest of justice that an inquiry should be made into an offence referred to in Clause (b) of section 195 (1) of the Cr.P.C. That section 340 Cr.P.C. authorizes the Court concerned to hold a preliminary enquiry, and then to make a complaint. The purpose of preliminary enquiry, even if the Court is to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. (Pritish Vs. State of Maharashtra (2002) 1 SCC 253).

Holding Preliminary Enquiry is not mandatory. Even though it is desirable for the Court to hold Preliminary Enquiry before making complaint, it is not mandatory. (Johnson Vs. State of Kerala 1996 Cr.L.J. 2338 (Ker).

15. He thus concluded his submission by arguing that in a case like this, this court should not exercise its inherent powers at this pre-mature stage as no case was made out. He submitted that the exercise of power under section 482 Cr.P.C. In a case of this nature is an exception and not a rule. The power under Section 482 Cr.P.C. to quash proceedings should not be arbitrarily exercised to cut short normal process of a criminal trial, except in exceptional cases, as held in the following judgments:-

1. STATE OF M.P. VS. AWADH KISHORE GUPTA
   (2004) 1 SCC 691

2. JANTA DAL VS. H.S. CHOWDHARY
   AIR 1993 SC 892

3. STATE OF HARYANA VS. BHAJAN LAL
   1992 SCC (Crl.), 426

4. STATE OF BIHAR VS. K.J.D. SINGH
   1993 Crl.L.J. 3537 (SC)

5. CBI Vs. RAVI SHANKAR SRIVASTAVA
   (2006) 7 SCC 188

16.He further submitted that the power under section 482 Cr.P.C. is not to be resorted to, if there is a specific provision in the Code for redressal of grievance. It should be exercised sparingly to prevent abuse of process of the Court or otherwise to secure the ends of Justice, and it should not be exercised against express bar of law engrafted in any other provision of the Code.

17. Though I have noted the submissions of counsel on either side in detail, I am of the view that it is not necessary to deal with these contentions and the petition is liable to be dismissed on the ground that it is pre-mature and is not maintainable at this stage, and this submission of the learned counsel for the respondent has adequate force in law. The respondent has filed the application under Section 340 of the Cr.P.C. and wants the action to be initiated against the petitioner alleging that the purported act of the petitioner constitutes commission of offence under Section 192 of the IPC as it amounts to interference in the course of justice and to influence the investigation as well as an attempt to fabricate the evidence. No orders on this application have been passed by the learned Trial Court so far. Only notice is issued to the petitioner

vide order dated 9.6.2003, which reads as under:

> "At the stage of Section 340 Cr.P.C. this Court is not required to express opinion on the guilt or innocence of the accused. An exercise of the Court at the stage is not finding whether any offence was committed or who committed the same. The Court is only required into the offence which appears to have been committed. The scope is confined to seeing whether the court could decide on the materials available that the matter requires inquiry by a criminal Court and that it is expedient in the interest of justice to have it inquired into.
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> Thus there is no compulsory requirement of issuing notice to the accused before initiating action in the matter under Section 340 Cr.P.C. Nonetheless, in the peculiar fact and circumstances of this case as mentioned in the application and supported by the documents, it is desirable and expedient to give notice of the petition to Mr.Madhavsinh Solanki."

18. The Special Judge thus thought it proper to issue notice to the petitioner before deciding as to whether any action is to be initiated in the matter under Section 340 Cr.P.C. or not. The learned Judge wants to have the version of the petitioner. Therefore, the more appropriate course of action for the petitioner was to respond to the said notice and state his objections which are raised here. At this stage, the learned Special

Judge has not even considered and formed his opinion as to whether action under Section 340 Cr.P.C. is warranted or not. It would be in the fitness of things that such a consideration is bestowed by the learned Special Judge in the first instance and he should apply his mind and pass orders on the application after considering the various submissions of both sides. The petitioner cannot presume that the learned Special Judge would ultimately decide to initiate the action. In the absence of any orders passed so far by the learned Court below, it would not be proper to entertain this petition in exercise of extra ordinary jurisdiction of this Court under Section 482 of the Cr.P.C.

19. The order dated 9.6.2003 itself suggests mental process of the learned Special Judge. Though the learned Trial Court is conscious of the fact that there is no compulsory requirement of issuing notice, he still chose to do so in the peculiar facts and circumstances of the case so that the petitioner is heard before the decision is taken on the application under Section 340 Cr.P.C. as to whether action at all is warranted or not. The Trial Court has, therefore, depicted requisite sensitivity. Therefore, in a matter like this, it would be proper that in the first instance Trial Court considers the submissions of the petitioner on the basis of which

petitioner argues that no case of proceeding against him under Section 193 IPC and Section 195 Cr.P.C. is made out.

20. In the case of STATE OF M.P. VS. AWADH KISHORE GUPTA ,(supra), the Supreme Court explained the scope and contours of powers under Section 482 of the Code in the following eloquent words:

> 8. "Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the Inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide, for all cases that may possibly arise - Courts, therefore, have inherent powers apart from express provisions of law which are. necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the Section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong In course of administration of justice on the principle *quando lex aliquid alique concedit, concedere videtur id sine quo res ipsa esse non potest* (when

> the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the Section, the Court does not function as a court of appeal or revision. Inherent, jurisdiction under the Section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercises of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto".

21. In State of Haryana Vs. Bhajan Lal (supra), the Supreme Court enlisted certain principles which are to be kept in mind while exercising power under Section 482 of Cr.P.C.. At the same time guiding principles laid down by the Supreme Court in the said judgment was that the Court

should examine as to whether the exercise of power is necessary to prevent abuse of process of any Court or otherwise to secure the ends of justice. The Court also observed that the quashment of FIR or complaint in exercise of inherent power of the High Court should be limited to very extreme exceptions. All the judgments cited by both the parties on the exercise of power under Section 482 Cr.P.C. reiterate the same principle. In the present case the Trial Court has not even formed any opinion as to whether any action under Section 340 Cr.P.C. is even warranted or not. Tendency of rushing to the higher courts when the matter is yet to be examined by the Trial Court is to be discouraged. Without exhausting the remedy which is still available before the Special Judge, as no orders adverse to the petitioner has so far been passed, it is not a stage where inherent powers under Section 482 be exercised. In Rakesh Kumar alias Lal and others Vs. State of UP and another 1994 Crl.L.J. 289, the Allahabad High Court refused to exercise its jurisdiction under Section 482 Cr.P.C. on the same principle. That was a case where on report of the police about alleged nuisance in a public way by the applicants, conditional order was passed by the Magistrate and the applicants were directed to show cause. Instead of filing

objections before the Magistrate the applicants filed a Revision before the Sessions Judge who rejected the same on the ground that the applicants had alternative remedy of a seeking cancellation of the notice by filing objections. It was held that recourse to petition under Section 482 Cr.P.C. was not permissible to such a party. In the case of JANTA DAL VS. H.S. CHOWDHARY (supra) the High Court had taken the view that it could take judicial notice of any illegality with a view to preventing injury being caused to known or unknown aggrieved party even when investigation was at its threshold. On this basis suo moto cognizance was taken issuing notice to CBI. The Supreme Court held that in doing so the Judge had overstepped his jurisdiction and quashed the show cause notice.

22. It would also be of use to reproduce the following extracts from the judgment of STATE OF M.P. VS. AWADH KISHORE GUPTA ,(supra):

> 9. "In R.P. Kapur v. State of Punjab AIR 1960 SC 866 this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.
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> (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations, When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the Section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death....".

23. Likewise in CBI Vs. RAVI SHANKAR SRIVASTAVA ,(supra) the

Apex Court reiterated the legal position in the following words:

> "While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ***ex debito justitiae*** to do real and substantial justice for the administration of which alone the courts exist".

24. In view of the above, I am of the opinion that the petitioner should raise all his contentions before the learned Special Judge in response to notice issued by him. While deciding as to whether any action under Section 340 Cr.P.C. is required to be initiated or not, the learned Special Judge shall consider all these submissions. It is also made clear that it would not be necessary for the petitioner to appear in person and will be at liberty to be represented through counsel, at the time of hearing of the application.

25. With the aforesaid observations, this petition is dismissed.

No costs.

August 20,2007. (A.K. SIKRI)
skk JUDGE